Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
Petition for Declaratory Ruling that VarTec Telecom, Inc., Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	WC Docket No. 05-276
SBC ILECs' Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for access Charges	)	WC Docket No. 05-276
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

REPLY COMMENTS OF WILTEL COMMUNICATIONS, LLC

I. INTRODUCTION AND SUMMARY

In its Comments, WilTel Communications, LLC ("WilTel") emphasized that the Commission's rules require payment of access charges for access traffic, regardless of the responsible party's regulatory classification or the technical means used to route the call, and that the terminating local exchange company ("LEC") may not charge access to parties with which it lacks contractual privity. LEC attempts to justify such charging are unpersuasive, as are attempts by companies with contractual privity to escape responsibility for legitimately imposed access charges. To ensure that responsible parties pay such access charges without giving ILECs authority to charge for access arbitrarily, the Commission must (1) enforce and, where necessary, strengthen its rules regarding transmission of call detail information, (2) implement stringent, yet efficient, auditing requirements, and (3) allow parties to develop efficient contractual

mechanisms to allocate responsibility for paying what all commenters agree are legitimately imposed access charges.

II. ILEC PROPOSALS IGNORE THE CONTRACTUAL PRIVITY REQUIREMENT AND WOULD RESULT IN INACCURATE BILLING OF ACCESS CHARGES

Predictably, terminating LECs seek the freedom to bill any party they choose for the termination of an access call. To address its failure to bill the correct carriers and/or to identify the correct category of services, for example, SBC asks for the right to bill parties upstream from the one from which it receives the call. Notwithstanding the multiple creative legal theories put forth by ILECs, however, there simply is no basis to give ILECs the ability to impose access charges on IXCs that lack privity with the terminating LEC.

As SBC recognizes, IXCs often hand off traffic to other parties (referred to by WilTel in its Comments as "Call Termination Providers") who create their own networks through arrangements they make with ILECs, CLECs and others in a manner designed to provide the most efficient service for their customers.[1] Long distance providers are customers of the Call Termination Provider, who is in turn the customer of the terminating LEC. The ordering and provisioning of terminating access services is a contractual arrangement between the party handing off the call and the terminating LEC to which it is handed. Black-letter law unambiguously holds that "only a party to a contract, or one who is in privity, may bring an action on the contract for its breach."[2] There simply is no legal basis for a terminating LEC to bill access charges to a company with which it has no contractual privity.

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[1] *See* Comments of WilTel Communications, LLC, p. 6 ("WilTel Comments"). As SBC acknowledges, these "Call Termination Providers" provide a valuable service in the telecommunications market, including extending a carrier's geographic reach to areas where it may not have facilities, and improving network reliability through added capacity and redundancy.

[2] *See* WilTel Comments, p. 5 (quoting *Corpus Juris Secondum*, vol. 17B, § 610, p. 315 (1999)). Tariffs take the place of contracts to specify the rates, terms and conditions governing the transaction between the parties in the case of access charges, and the privity requirement continues to apply.

Even if the terminating LEC legally could collect such charges from companies that lack a contractual relationship with the terminating LEC, doing so is poor public policy. Allowing such arbitrary charging of access would introduce further confusion, would fly in the face of clear intercarrier compensation rules, and would subvert the underpinnings that support robust competition for wholesale long distance service.

First of all, such a decision would create uncertainty and encourage wasteful litigation as parties seek to determine which company is responsible for access payments. While parties appeal to the Commission and the courts for a ruling, some companies will continue to leverage the uncertainty to gain a competitive advantage. Moreover, giving terminating LECs the right to choose who pays access charges would interfere with the dynamically competitive market for long distance termination services by raising the specter that retail or wholesale voice providers unexpectedly could be charged by ILECs for access in addition to charges imposed by its vendor.

Some commenters suggest that the "constructive ordering doctrine" would allow a terminating LEC to bill any upstream provider for termination of a call.[3] The "constructive ordering doctrine" holds that a party "orders" a carrier's services when the receiver of services (1) is interconnected with the provider in such a manner that it can expect to receive access services, (2) fails to take reasonable steps to prevent the receipt of access services, and (3) does in fact receive such services.[4] Simply put, the constructive ordering doctrine requires privity, and the cases cited by commenters support this conclusion.[5] Further, the terminating LEC must

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[3] *See, e.g.*, Comments of SBC Communications Inc., at pp. 11-14 ("SBC Comments"); PointOne Comments, at pp. 25-28; Comments of Qwest Communications International Inc., at p. 18 ("Qwest Comments").

[4] *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680 (E.D. Va. 2000) ("*Advamtel*") (citing *In re Access Charge Reform*, 14 FCC Rcd 14221 (1999).

[5] *See, e.g., Advamtel* (dispute between LECs and IXC for payment of access charges for services provided directly to IXC where IXC did not dispute that services were in fact received, just that the rates were unreasonable); *United Artists Payphone Corp. v. New York Telephone Co. and American Telephone and Telegraph Co.*, Memorandum Opinion and Order, 8 FCC Rcd 5563 (1993) ("*United*") (enforcement action between IXC and payphone provider for payment for certain dial-around services provided directly to payphone provider where payphone provider did

show "affirmative action ... to establish a [customer] relationship."[6] Here, ILECs seek to apply access charges to companies that are not interconnected with and do not receive access services from the terminating LEC. Accordingly, the "constructive ordering" doctrine does not support imposing liability on companies that lack privity with the terminating LEC.

Some ILECs advocate imposing "joint and several liability" upon parties with whom there is no contractual privity.[7] This theory has no basis in law and also begs the question of whether a party can be subject to joint and several liability if it commits no tort. As SBC admits, joint and several liability is a tort theory based upon wrongful conduct of two or more parties.[8] SBC's attempts to apply this theory to what is in fact a simple contractual issue is misplaced. The nonperformance of a contractual obligation – in this case, a tariff payment obligation – constitutes a breach of contract and does not give an ILEC the right to attempt to enforce that obligation on third parties, absent of course an agreement to the contrary. Even if misrouting of traffic constituted a tort, moreover, joint and several liability could not apply unless both parties were responsible for the tort. It would not be proper for the FCC to impose joint and several liability where only one party committed the tort.

Finally, BellSouth theorizes that when a Call Termination Provider transports traffic handed to it by an upstream IXC, the Call Termination Provider is acting as an "agent" of the IXC and, thus, should be liable for the contractual obligations of the Call Termination Provider

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not dispute that long distance services were in fact received, just that the calls made were unauthorized and, therefore, not "ordered").

[6] *Advamtel*, 118 F. Supp. 2d at 687 (quoting *AT&T v. City of New York*, 83 F.3d 549 (2nd Cir. 1996). When a Call Termination Provider orders services from the terminating LEC, the Call Termination Provider's customer (the IXC) cannot be said to have affirmatively ordered services in any manner from the LEC. The Call Termination Provider determines from whom it will purchase terminating access services and then prices its services to the IXC accordingly. The IXC has no role whatsoever in ordering the access services.

[7] SBC Comments, at pp. 15-16; Qwest Comments, at pp. 19-22.

[8] SBC Comments, at p. 16 (citing Restatement (Second) of Torts § 875 (1979)). Qwest cites no authority and provides no legal basis for a "joint and several" liability theory. *See* Qwest Comments, at pp. 19-22.

downstream.[9] BellSouth provides no support for this theory.[10] To the contrary, an agency relationship requires both the ability of the principal to control the agent's conduct,[11] and the ability of the agent to "alter legal relations" of the principal.[12] Further, "a principal must voluntarily grant an agent the power to bind him in contracts with third parties."[13] In call routing situations involving Call Termination Providers, IXCs do not control the conduct of such providers. Call Termination Providers design their own networks and make their own arrangements with ILECs, CLECs and others for terminating access. Often, the customers of Call Termination Providers will not even know with whom the entity is contracting downstream. There is simply no basis to argue that a Call Termination Provider can bind an IXC to a contractual arrangement entered into solely at the discretion, and by authority, of the Call Termination Provider itself.

III. OTHER PROPOSALS MERELY SEEK TO DEFLECT RESPONSIBILITY FOR HANDING OFF CALLS SUBJECT TO ACCESS CHARGES

Other carriers seek to deflect responsibility for calls that they terminate on an ILEC's network. For example, PointOne asserts that it is not an "interexchange carrier" as contemplated by Rule 69.5 and is therefore exempt from access charges generally, and that the long distance carriers handing traffic to it should be obligated for access charges for services ordered by, and

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[9] Comments of BellSouth, at pp. 8-9 ("BellSouth Comments").
[10] The only legal authority cited by BellSouth in support of this theory is a Commission ruling that a carrier is responsible for the actions of its *sales agents* in their treatment of customer proprietary network information. BellSouth Comments, at p. 9, f.n. 12 (citing *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket Nos. 96-115 & 96-139, *Order on Reconsideration and Petitions for Forbearance,* 14 FCC Rcd 14409, 14496, ¶ 170 (1999)).
[11] Restatement (2d) Agency, § 14 ("A principal has the right to control the conduct of the agent with respect to matters entrusted to him.").
[12] *Id.*, § 12 ("An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.").
[13] *U.S.C.C Management Co. v. Ogden Allied Sec. Services, Inc.,* 1991 U.S. Dist. LEXIS 18535 (D. Ill. 1991).

provided to, PointOne.[14] Similarly, NuVox Communications, XO Communications and Xspedius Communications argue that CLECs should not be liable for access charges even where the CLEC voluntarily agrees with an IXC through agreements or tariffs to terminate calls on ILEC networks.[15] Under these theories, a CLEC or a Call Termination Provider identifying itself as an "enhanced" provider would *never* be liable for access charges.[16]

WilTel urges the Commission to avoid granting a broad exemption that would undermine the fundamental principles, discussed above, that companies handing access traffic to terminating LECs are responsible for paying access charges (per their contracts or applicable tariffs), and terminating LECs may not impose access charges on companies with which they lack privity. Exempting Call Termination Providers that have a contractual relationship with the terminating LEC would prevent the terminating LEC from collecting access charges for access service. Additionally, it is fair not to exempt Call Termination Providers (including CLECs with applicable contractual arrangements with ILECs) because they have the right to enter into agreements and tariffs that provide the opportunity to limit risk and bind their customers to payment of charges applicable to traffic for which access charges are due to the terminating LEC.[17] Finally, exempting these companies would negatively impact the market for wholesale voice services by encouraging wasteful litigation and creating the possibility that long distance companies could be charged by terminating LECs for access and by its vendors pursuant to contracts.

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[14] *See generally*, Comments of PointOne.
[15] *See generally*, Comments of Joint CLEC Commenters ("Joint CLEC Comments").
[16] Joint CLEC Comments, at p. 4. Except where they are acting like an IXC.
[17] The Commission left no doubt that even a CLEC could be considered an "interexchange carrier" for purposes of the Commission's access charge rules and thus subject to terminating access charges. *AT&T IP-in-the-Middle Order*, ¶ 19, f.n.80.

IV. THE COMMISSION MUST TAKE STEPS TO FACILITATE PROPER APPLICATION OF ACCESS CHARGES

To eliminate this and other issues concerning the services for which and carriers to whom access applies, WilTel urges the Commission to complete its reform of the intercarrier compensation regime as soon as possible and in so doing to establish a single rate for the termination of all traffic, regardless of the technology used or the purported regulatory classification of the provider. Pending such reform, the Commission must take steps now to facilitate the proper application of access charges rather than allowing terminating LECs to arbitrarily impose access charges on any party. Rather than allowing terminating LECs to arbitrarily impose access charges on any party, the Commission should take steps to facilitate the proper application of access charges. Terminating LECs can charge accurately if parties transmit accurate call detail record information or, for parties lacking such ability, if the ability exists to audit traffic efficiently.

First and foremost, the Commission must enforce and, where necessary, strengthen its rules regarding transmission of call detail information. An overwhelming number of companies agree that parties must ensure the transmission of accurate call detail record information, which in turn will help resolve the terminating LECs' failure to accurately bill access charges. A terminating LEC can charge accurately when parties transmit accurate call detail information or, in the absence of such ability, when the LEC has the ability to efficiently audit the traffic it receives for PSTN-termination. There are instances where the terminating LEC may be unable to ascertain the true nature of the traffic handed it by a Call Termination Provider and, as a result, be unable to accurately bill for termination of the call. As WilTel discusses in more detail in its Comments,[18] the Commission can alleviate this problem now by requiring LECs to cooperate

[18] *See* WilTel Comments, at pp. 9-11

with IXCs, CLECs, and other Call Termination Providers to identify different types of traffic being exchanged by enforcing its existing rules and, where necessary, adopting new requirements regarding accurately populating and transmitting information necessary to identify calls.[19] In addition, the Commission should be very clear that penalties will be imposed for improper use or manipulation of such data.

Further, the Commission must implement stringent, but efficient, auditing requirements for those situations where accurate call detail information may not be available. Such requirements should include "PIU-type" certification and audit procedures to distinguish between traffic types. Until technical solutions are developed for the accurate provision of data in such circumstances, this certification and audit requirement will alleviate the problems of identifying and accurately billing traffic.

Finally, the Commission must allow parties to develop efficient contractual mechanisms to allocate responsibility for paying what all commenters agree are legitimately imposed access charges. As discussed previously, CLECs have the right and the ability to pass access charges on to IXCs. Similarly, Call Termination Providers should be allowed to contract individually with their customers to deal with the potential risk of access charges when handing traffic off to a terminating LEC. Call Termination Providers compete for the services they provide to IXCs and other providers. The Commission must avoid allowing ILECs the unilateral control over who it charges for terminating access and allow the market to dictate how these charges are ultimately passed on.

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[19] *Id.*, at p. 10.

V. CONCLUSION

There is no dispute that SBC is entitled to access charges for termination of PSTN-to-PSTN calls to its end users. However, VarTec is correct that the provider that hands the call to SBC, regardless of the purported regulatory classification, is the party liable for payment of access charges. The Commission must act quickly to clarify these issues once again.

At its core, this proceeding is really driven by an Intercarrier compensation regime that is in dire need of reform. The huge pricing discrepancies that apply to different "classifications" of voice termination (inter vs. intrastate access, interconnection) distort the market, cause wasteful expenditures, and induce carriers to make attempts at reclassifying their traffic to be taxed less for use of the local network. WilTel has repeatedly urged the Commission to work out a unified compensation system in which such incentives are removed. This proceeding is further evidence that such reform is long past due.

Respectfully submitted,

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